

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

In the Matter of:

South Valley Station
Yerington, Nevada 89447
(Leslie West and Lisa Smith,
Petitioners)

Docket No. A2012-108

**MOTION BY UNITED STATES POSTAL SERVICE TO STRIKE
REPLY COMMENTS OF PUBLIC REPRESENTATIVE**
(March 20, 2012)

On March 9, 2012, the Public Representative filed in this docket Reply Comments (Comments) accompanied by a motion for late acceptance.¹ Those Comments are inconsistent with legal process and procedure, and with the role a public representative designated by the Postal Regulatory Commission (Commission) to represent the interests of the general public can or should play in a Commission proceeding. The Comments also fail to display awareness of the legal constraints upon how a public representative may go about collecting and presenting to the Commission information thought to bear upon the Commission's legal authority to review Postal Service decisions to discontinue Post Offices pursuant to section 404(d) of Title 39. In addition, the Comments also exhibit a misunderstanding of how Title 39 allocates authority to make respective decisions and demonstrates a casual indifference to best practice. Therefore, the Postal Service moves to strike the Comments, which would remove the Comments from the Commission's purview in this docket.

¹ See Motion of Public Representative for Late Acceptance of Comments, PRC Docket No. A2012-108, March 9, 2012; Public Representative Reply Comments, PRC Docket No. A2012-108, March 9, 2012.

The Postal Service herein explains its opposition to acceptance of the Public Representative's Comments in this docket and why the Commission should exclude them while pursuing any additional internal action that the Commission may conclude is warranted. The Postal Service, first, explains that much of the information upon which the Public Representative's Comments rely was obtained from direct contact by the Public Representative with various Postal Service employees,² and this practice is inconsistent with several sources of authority. Second, the Comments are based on incorrect statements about the applicability of certain federal laws and regulations to the Yerington Post Office. Third, the Comments do not concern "the record on review" as defined in 39 C.F.R. §3001.112. Fourth, the Postal Service notes that the Commission has consistently stated that the Commission is barred from considering such post-record information. Therefore, the Postal Service moves to strike the Comments of the Public Representative filed in this docket on March 9, 2012.³

² Examples of such contact in the Comments of the Public Representative include the following: "Postal Service employees confirmed ..." (n.6); "The PR confirmed with the Postmaster ..." (at 6); "The Postmaster confirmed by email ..." (at 6); "The Postmaster put these statements in writing and this email correspondence is included as an attachment with permission in this Docket" (n.9); "the PR contacted the Yerington Postal Service staff directly to ask ..." (at 7); "The Postmaster ... could not confirm ..." (n.12); "the Postmaster reports ..." (see attached email and Postmaster letter that follows PR comments)" (at 8); "Postal Service staff contacted by the PR, clarified ..." (at 8); "The Postmaster confirmed ..." (at 8), "Yerington, NV Postmaster Attachment" (at 10-14).

³ The Postal Service also renews the arguments that the Commission lacks jurisdiction to hear Petitioner's appeal in this docket. See Comments of United States Postal Service, Docket No. A2012-108, February 21, 2012, at 1-2; Initial Comments of the United States Postal Service, section 1 (pp. 2-7), PRC Docket No. RM2011-13, October 3, 2011.

I. The Public Representative's Comments Should Not be Considered by the Commission because the Information Upon which the Comments Rely was Obtained from Direct Contact by the Public Representative with Postal Service Employees

In Order No. 1147, the Commission designated an officer of the Commission (Public Representative) pursuant to 39 U.S.C. § 505 “to represent the interests of the general public.”⁴ Section 505 states that “[t]he Postal Regulatory Commission shall designate an officer of the Postal Regulatory Commission in all public proceedings (such as developing rules, regulations, and procedures) who shall represent the interests of the general public.”⁵ Section 505 was enacted as part of the Postal Accountability and Enhancement Act of 2006 (PAEA).⁶ According to H.R. Rept. 108-672, “[s]ection 505 ensures that the existing role of a Consumer Advocate is maintained in all proceedings of the new Postal Regulatory Commission, to ensure that the interests of the general public are represented.”⁷

Rules specific to the Office of the Consumer Advocate, which served as the predecessor Commission unit to the Public Representative, are set forth in 39 C.F.R. § 3002.14. According to 39 C.F.R. § 3002.14(a), “[t]he Office of the Consumer Advocate provides representation for the interests of the general public in Commission proceedings.”⁸

The Postal Service understands that the Office of the Consumer Advocate no longer exists as such. However, as is evident in Order No. 1147, the

⁴ PRC Order No. 1147, Notice and Order Accepting Appeal and Establishing Procedural Schedule, PRC Docket No. A2012-108, January 19, 2012, at 3.

⁵ 39 U.S.C. § 505.

⁶ Postal Accountability and Enhancement Act, Pub. L. No. 109-435 (2006).

⁷ H.R. Rept. 108-672, pt. 1, at 21 (2004).

⁸ 39 C.F.R. § 3002.14(a).

Commission continues to designate representatives of the public interest in the form of a Public Representative. Thus, the regulations set forth in 39 C.F.R. § 3002.14 perforce apply to individuals designated to act as Public Representative in a Commission proceeding. According to 39 C.F.R. § 3002.14(b), the Office of the Consumer Advocate “includes both litigation attorneys and a broad spectrum of technical expertise to analyze and evaluate the diverse economic, cost and market issues before the Commission.”⁹ Because 39 C.F.R. § 3002.14(a) states that the Office of the Consumer Advocate “prepares and litigates before the Commission legal and evidentiary presentations,”¹⁰ section 3002.14(a) implies that an individual designated to serve as an officer of the Commission (Public Representative) in a Commission proceeding should be considered to be acting under 39 C.F.R. § 3002.14. According to the Mission Statement of the Office of the Consumer Advocate, the Consumer Advocate (and thus the Public Representative) will “[u]tilize all means and procedures available under the Commission’s rules and applicable law to present evidence and arguments on behalf of consumers in Commission proceedings.”¹¹

In this case, the Public Representative was representing the general public in what the Commission is handling as a Post Office discontinuance appeal. However, contrary to the Mission Statement of the Office of the Consumer Advocate, the Postal Service submits that the Public Representative

⁹ 39 C.F.R. § 3002.14(b).

¹⁰ 39 C.F.R. § 3002.14(a).

¹¹ 39 C.F.R. 39 Part 3002, Appendix A, Postal Regulatory Commission, Mission Statement of the Office of the Consumer Advocate (Mission Statement of the Office of the Consumer Advocate). See also Mission Statement for Office of Consumer Advocate, 64 Fed. Reg. 37,401 (July 12, 1999).

did not utilize means and procedures available under the Commission's rules and applicable law to present evidence and arguments on behalf of consumers in this docket. Much of the information that is included in the Public Representative's Comments were obtained by the Public Representative making direct contact with Postal Service employees, as the Comments themselves document.¹² The undersigned counsel has no record of being consulted by the Public Representative prior to such contact, and has no record of having offered consent to such contact. Such contact is, in the Postal Service's view, unauthorized and inconsistent with the American Bar Association Model Rules of Professional Conduct,¹³ which the Postal Service submits should apply here by analogy in an instance where a non-attorney Public Representative is acting as a litigant in an adversarial proceeding.¹⁴

Rule 4.2 of the American Bar Association Model Rules of Professional Conduct states that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."¹⁵

Furthermore, Comment [3] to Rule 4.2 states that "[t]he Rule applies even though

¹² See footnote 2.

¹³ American Bar Association Model Rules of Professional Conduct, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

¹⁴ In this docket, the Petitioner is apparently also the postmaster of the affected facility. While the Postal Service does not take the position that contact between a public representative and any specific Petitioner is improper, when the Petitioner is also a postal employee, the situation is certainly more complex. The Postal Service would not agree that any and all contact between a public representative and a petitioner/employee would necessarily be acceptable. Where this line might be found is beyond the scope of the discussion in this pleading. The Public Representative herein did not limit contact with postal employees to just the Petitioner.

¹⁵ American Bar Association Model Rules of Professional Conduct, at Rule 4.2.

the represented person initiates or consents to the communication.” According to Comment [3], “A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.”¹⁶ In addition, Comment [7] states that

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.... In communicating with a current or former constituent of the organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.¹⁷

As the Comments clearly reflect, the Public Representative’s official conduct in this docket is not consistent with the standard set forth in Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, which should apply by analogy in this context. The Public Representative’s actions in this proceeding were, moreover, undertaken despite awareness of the Postal Service’s stated position on contact with employees in the context of litigation.¹⁸

¹⁶ *Id.*, at Rule 4.2, Comment [3].

¹⁷ *Id.*, at Rule 4.2, Comment [7].

¹⁸ In footnote 13 of the Public Representative’s reply comments, the Public Representative acknowledges that:

The Postal Service Headquarters staff has requested that the PRs contact them directly related to AR deficiencies. With all due respect to the integrity of the Postal Service Headquarters staff, the PR believes this request in general, is inappropriate because it potentially raises an ethics issue not only for the PR, but in the mind of the general public in regards to these proceedings. See Postal Service Comments filed on February 18, 2012 in Docket A2012-83.

The Postal Service accordingly submits that the appropriate remedy in this case is to exclude the Public Representative's submission, since it relies on information and evidence obtained without first securing consent from Postal Service counsel.

In sum, because the Public Representative's Comments appear to be based on information obtained from communications with an employee of the Postal Service, which were not in accordance with either the Mission Statement for the Office of the Consumer Advocate or Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, the Postal Service moves that the reply comments of the Public Representative filed in this docket on March 9, 2012, be stricken from the record of this docket or otherwise given no weight.

II. The Public Representative's Comments are Based on Incorrect Statements about the Applicability of Certain Federal Regulations to the Yerington Post Office

According to the Rules Applicable to Appeals of Postal Service Determinations to Close or Consolidate Post Offices,

[t]he written determination sought to be reviewed or enforced, the conclusions and findings upon which it must be based under section 404(b)(3) of the Act, the notices to local patrons and the evidence contained in the entire administrative record before the Postal Service shall constitute the record on review. The record shall contain all evidence considered by the Postal Service in making its determination and shall contain no evidence not previously considered by the Postal Service.¹⁹

The Public Representative does not otherwise explain what ethical issues are seen as in play, although this statement does reflect clear understanding that the Postal Service has provided notice of what this motion identifies as a serious concern.

Postal officials have no specific knowledge whether this Public Representative sought or received advice of counsel.

¹⁹ 39 C.F.R. §3001.112.

The central argument set forth in the Public Representative's Comments consists of broad, general statements about the presumed applicability of the Americans With Disabilities Act of 1990, as amended, 26 U.S.C. § 12101 *et seq.* (ADA). As such, the central fallacy of the Comments derives from the legal fact that the Postal Service is not subject to the ADA. The Postal Service is not subject to the ADA because, according to 39 U.S.C. § 201, the Postal Service is "an independent establishment of the executive branch of the Government of the United States."²⁰ The only part of the ADA that could even arguably apply to the Postal Service is Title III, Public Accommodations. But that Title does not apply to the Yerington Post Office because the statute defines "public accommodations" as *private* entities that own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, or private schools. Therefore, the Postal Service, whether as a facility owner, lessee, lessor, or operator, is not subject to the ADA.

However, the Postal Service *is* subject to the Architectural Barriers Act (42 U.S.C. § 4151 *et seq.*) (ABA) and the Rehabilitation Act (29 U.S.C. § 701 *et seq.*). The ABA has detailed accessibility standards (which the Postal Service has adopted in Handbook RE-4) concerning every architectural element that a Postal Service facility might have. The ABA applies to leased space in most instances and applies to owned buildings to the extent they were constructed or altered after 1968. Under the Rehabilitation Act, the Postal Service is obligated to provide customers access to Postal Service programs and activities without

²⁰ 39 U.S.C. § 201. Many federal laws applicable generally to the federal government are inapplicable to the Postal Service. See *generally*, 39 U.S.C. § 410 (Application of Other Laws).

discriminating on the basis of disability. Section 504 is implemented through 39 C.F.R. § 255. The Rehabilitation Act applies even if the ABA does not and even if the facility is in compliance with the ABA.

The Postal Service owns the Yerington Post Office. It was built in 1939 and is on the national historic register. The building's construction predates the enactment of the Architectural Barriers Act. Further, there is no evidence to suggest that a particular building element in the facility was altered since August 12, 1968 such as to trigger application of the ABA. Therefore, the facility is not required to comply with ABA standards, and it is the Rehabilitation Act that governs program access at the facility.

In that regard, the Postal Service did address, in the administrative record, whether the Yerington Post Office could accommodate "special customer needs" ("People who cannot read or write, who cannot drive, who have infirmities or physical handicaps, etc.") in Question No. 12 of Item No. 15, Post Office Survey Sheet. The response is that such customers "can be accommodated at the Yerington Main Office."²¹ Thus, the Postal Service will provide individualized program access to disabled customers of the Yerington Post Office under the Rehabilitation Act.

Furthermore, the Commission does not have jurisdiction under section 404(d) of Title 39 to respond to a complaint from the Public Representative, who is representing the general public, on behalf of those "[m]embers of the public who are unable to use or who have difficulty using certain postal services [who]

²¹ Notice filed by United States Postal Service, PRC Docket No. A2012-108, January 30, 2012 (Administrative Record), Item No. 15, Post Office Survey Sheet, at 2.

may be eligible under postal regulations for special arrangements.”²² The relevant regulation, 39 C.F.R. § 255.7, states that “A local postal manager receiving a request or complaint about a special arrangement for postal services must provide any arrangement as requested by postal regulations. If no special arrangements are required by postal regulations, the local postal manager, in consultation with the district manager or area manager, as needed, may provide a special arrangement or take any action that will accommodate an individual with a disability as required by section 504 or by this part.”²³

III. The Public Representative’s Comments Do Not Concern “the Record on Review” as Defined in 39 C.F.R. § 3001.112

The Commission has docketed this matter under section 404(d) of Title 39, which provides jurisdiction over “the record on review” as defined in 39 C.F.R. § 3001.112.²⁴ None of the factual information the Public Representative purports to supply consists of record evidence. Supplied information includes:

- Section I, Summary, page 1, in its entirety, because it is based on broad general statements about the presumed applicability of certain Federal regulations to the Yerington Post Office and goes far beyond the record on review as defined in 39 C.F.R. §3001.112;
- Section II, Introduction, pages 2-5, which include a large amount of information that is not part of the “record on review” in this

²² 39 C.F.R. § 255.7.

²³ *Id.*

²⁴ Of course, the Commission also understands that the Postal Service does not concede the applicability of this section to discontinuance of subordinate retail facilities, but that need not divert the immediate discussion.

proceeding, some of which appears to have been obtained through communications with a Postal Service employee;

- Section II, Economics Analysis, page 6, which is not a review of the record, but rather based on information that the Public Representative obtained through communications with a Postal Service employee and the South Valley Station landlord/lessor;
- Section II, Employee Concerns, page 6, which is not a review of the record, but rather based on information that the Public Representative obtained through communications with a Postal Service employee;
- Section III, Other Commission Considerations, page 7, sections of footnote 12 and first full paragraph, line 3 beginning with “Due to the” through the end of the paragraph, because the information, according to the Public Representative, was obtained from the Postmaster or by contacting “the Yerington Postal Service staff directly”,²⁵

²⁵ The Comments of the Public Representative incorrectly state, on page 7, that the “[d]iscontinuance [l]aws [r]elated to [p]roposal [p]ostings [i]nviting [p]ublic [c]omments at [a]ffected [f]acilities [a]ppear to [h]ave [b]een [v]iolated,” because the Proposal to Close the South Valley Station, NV Station and Continue to Provide Service by Independent Post Office (Administrative Record, Item No. 33, Proposal) was not posted at the Yerington Post Office. There was no requirement, at the time, to post the proposal of the discontinuance of a station in affected Post Offices. The discontinuance of the South Valley Station was subject to the procedures set forth in Chapter 7 of Handbook PO-101 (August 2004) updated with Postal Bulletin revisions through August 2, 2007 (2007 Handbook PO-101). These regulations were carried forward for discontinuance actions commencing before July 14, 2011. See 39 C.F.R. § 241.3(a)(1)(ii). Section 71 of the 2007 Handbook PO-101, at 53, states that “Although thorough investigation and customer participation are encouraged in the discontinuance of a classified station, branch, or a community Post Office (CPO), the formal process followed in the discontinuance of independent Post Offices is not required.”

- Section III Arbitrary Data Considerations, page 8, third paragraph, line 3 beginning with “The Postmaster” through the end of the paragraph, because it includes information that the Public Representative states was obtained from the Postmaster directly, which is not included in the record on review as defined in 39 C.F.R. §3001.112;
- Section III, Regular and Effective Service, page 8, from first paragraph, line 2 beginning with “The Postal Service’s suggestion ...” to the end of the paragraph, because it is based on broad general statements about the presumed applicability of certain Federal regulations to the Yerington Post Office and goes far beyond the record on review as defined in 39 C.F.R. §3001.112;
- Section IV, Conclusion, page 9, line 3, “and existing blatant inattention to facility disability regulations compliance and issues,” because it is based on broad general statements about the presumed applicability of certain Federal regulations to the Yerington Post Office and goes far beyond the record on review as defined in 39 C.F.R. §3001.112; and
- Pages 10-14, “Yerington, NV Postmaster Attachment,” because it is information that the Public Representative obtained from the Postmaster directly, which is not included in the record on review as defined in 39 C.F.R. §3001.112;

IV. The Commission is Barred from Considering Post-Record Information

The Commission has consistently stated that “its responsibility in adjudicating appeals of Postal Service determinations to close or consolidate post offices is limited to “the record before the Postal Service in the making of such determination[s].” 39 U.S.C. § 404(d)(5).²⁶ In such dockets, the Commission refrained from considering post-record information,²⁷ and “[t]he Commission has not relied on post-record information” when evaluating the appeal”²⁸

Consistent with such previous determinations, the Commission should grant this motion to strike the Public Representative’s Comments, because the Comments contain post-record information that the Commission may not consider when evaluating this appeal.

V. Conclusion

In conclusion, the United States Postal Service hereby moves to strike the Comments of the Public Representative filed in this docket on March 9, 2012.

²⁶ PRC Order No. 1194, Order Affirming Determination (concerning Canehill, Post Office, Canehill, Arkansas), PRC Docket No. A2012-20, at 3, n.9. See also PRC Order No. 1217, Order Affirming Determination (concerning Ogden Post Office, Ogden, AR), PRC Docket No. A2012-31 at 3, n.5; PRC Order No. 1222, Order Affirming Determination (concerning Glenwood Post Office, Glenwood, Alabama), PRC Docket No. A2012-25, at 3, n.5.

²⁷ PRC Order No. 1217, at 3, n.5.

²⁸ PRC Order No. 1194, at 3, n.9.

Respectfully submitted,

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